Filed 11/5/10 P. v. Huber CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON HUBER and ANGIE SUSAN HUBER, Defendants and Appellants.	F057731 (Super. Ct. No. 1226483) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Jason Huber, Defendant and Appellant.

Elaine Forrester, under appointment by the Court of Appeal, for Angie Susan Huber, Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

STATEMENT OF THE CASE

Appellants Jason Huber (Jason) and Angie Huber (Angie) were charged with one count of forgery (Pen. Code,[1] § 470(d)) and one count of recording a false instrument (§ 115(a)). Following a trial by jury, both appellants were convicted on each count.

Appellants were sentenced on May 1, 2009. With regard to both appellants, the court suspended imposition of sentence and placed them on three years formal probation subject to service of 120 days in the county jail.

Appellant Angie Huber filed a timely notice of appeal on May 13, 2009. Appellant Jason Huber filed a timely notice of appeal on June 30, 2009.

STATEMENT OF FACTS

Lester and Kathy Henslee (the Henslees) lived in Hickman, California, where Mr. Henslee ran his own business. Their daughter, appellant Angie Huber, and her husband, appellant Jason Huber, also lived there. Throughout their marriage, appellants struggled with financial difficulties. Jason often moved from job to job while Angie only worked occasionally.

In 2002, a 1.5 acre parcel of property with a mobile home, located at 801 Hickman Avenue came on the market. Appellants were unable to purchase the property due to their financial situation, so they approached Kathy and Lester about helping them buy the property. The Henslees purchased the property with the understanding that appellants would live there and make the monthly mortgage payments so that Lester and Kathy would not be out any money. Appellants promised to obtain their own financing within one year and get the property ownership in their name. In July of 2002, the Henslees purchased the property for $205,000 and took title as joint tenants.

Appellants made the mortgage payments during the first year that they lived on the property. However, appellants began missing several payments and were unable to pay

[1] Further statutory references are to the Penal Code unless otherwise indicated.

the real estate taxes and insurance on the property. After a year of living on the property, they were still unable to obtain financing to pay for the home. Whenever appellants failed to pay, the Henslees would pay the mortgage themselves. The Henslees made approximately 15 to 20 payments during the time appellants lived on the property and also paid all of the property taxes and insurance.

Appellants' mortgage broker, Tony Scott, tried numerous times to obtain a "purchase loan" on the property. He told appellants that he needed a "gift letter" from the Henslees stating that they were gifting the equity of the property to appellants. Scott testified that he received such a "letter" from both appellants, which purported to be from Lester Henslee, and gave it to prospective lenders. Although a loan did get approved, appellants were unable to obtain the loan on terms they could afford. Scott indicated to them that they might be able to get a refinancing loan if their names were already on the deed to the property.

On August 18, 2005, the Henslees were at Don Pedro Reservoir on vacation when Lester Henslee received a cell phone call from Angie Huber. The connection was poor, and he missed much of what she said. He understood Angie as saying that she and Jason were once again trying to obtain a loan for the property, and he told her to "go for it." However, at no time did he believe he was authorizing appellants to sign his or his wife's name to any loan documents or to have themselves declared as joint tenants with appellants.

That same day, appellants took an unsigned grant deed to their insurance agent, Dirk Vermeulen, who was also a notary public. The deed recited that Lester and Kathy Henslee were granting equal interests in the subject property to Lester, Kathy, and appellants, "all as joint tenants." The deed also contained signature lines with the names of all four people. However, both Lester and Kathy Henslee testified that they never intended to convey any interest in the property to appellants, and neither of them signed their names to the grant deed nor gave permission for anyone to do so on their behalf.

Jason told Vermeulen that they were going to go "up to the property" to obtain the Henslees' signatures. Vermeulen then improperly notarized the document to indicate he had witnessed all four signatures.[2] He testified that he authenticated the signatures of appellants but the signatures for Lester and Kathy Henslee were left blank when he notarized the document. After the document was notarized, Vermeulen observed appellants in an argument outside his office. Jason took the document from Vermeulen and told him, "We'll take care of this later today." However, Vermeulen did not go with appellants to 801 Hickman or Don Pedro Reservoir to obtain the Henslees' signatures. Appellants did not return to Vermeulen's office or follow up with him.

Appellants then drove to Modesto where Angie took the deed into the Stanislaus County Recorder's Office and had it recorded. While at the office, Angie filled out and signed a preliminary change of ownership form which required her to answer "yes" or "no" to a series of questions. Angie answered "yes" to several questions acknowledging a transfer ownership and creation of joint tenancy between the Henslees and appellants. Despite these efforts, appellants were still unable to obtain a loan. Appellants continued to live on the property but never mentioned the recorded grant deed to the Henslees.

After attempts to obtain a loan failed, appellants told the Henslees that they would move from the property, but they continued to live there. Eventually, in 2006, appellants separated and both moved from the property. In 2007, the Henslees decided to sell the property. Their real estate agent researched the title and discovered the grant deed that appellants had recorded. When Lester confronted Angie about the document, she apologized and immediately executed a quitclaim deed conveying her interest back to her parents. Lester testified that she was surprised and said that the only way the transfer of

[2]As a result, Dirk Vermeulen was originally charged as a codefendant in this case. He entered into a negotiated disposition in exchange for his truthful testimony against appellants; he was placed on probation, lost his notary commission and served a term in county jail.

interest was supposed to take place was if their loan went through. Lester's attorney contacted Jason about quitclaiming his interest. Jason refused.

Defense

Both appellants testified in their own defense. Angie testified that her highest level of education was high school and that she had never purchased real property before and did not understand the significance of a grant deed. She also testified that Jason was the financial provider and decision maker in the family while she was mostly a stay-at-home mom. Angie understood that her parents were to assist her and Jason in buying the property, and that she and Jason would make payments on the mortgage until they were eventually able to obtain a purchase loan on their own. She was told that if they could get their names on the deed, they would be able to refinance the loan to pay for the property.

Angie testified that when her father was on vacation she called him and told him that she and Jason were going to get a loan and that the property would soon be out of his name. When Lester responded with, "Go for it," Angie interpreted that as his permission to do what she needed to do in order to obtain the loan, including authorization to sign her parents' names to the deed.

After the phone call with her father, Angie and Jason went to Dirk Vermeulen's office and signed a document that Jason prepared. Angie believed that they would pick up Mr. Vermeulen and drive up to where the Henslees were located to get their signatures. However, she admitted that while in Dirk's office she signed her mother's name on the deed and indicated that Jason signed her father's name. She testified that she never read the document but only signed it because she believed they "were very close to obtaining a loan" and was told it was going to help her get a loan. Angie also acknowledged taking the deed to the recorder's office and having it recorded. She believed she needed to record the document in order to get a loan.

Angie never told her parents about the grant deed because she assumed that when the loan fell through, the grant deed was void and no transfer of ownership ever took place. She testified that since she and Jason never owned the property, she signed a quitclaim deed in favor of her parents, and it was recorded on April 19, 2007. Angie believed it was not right for her and Jason to be on the title of the property since the loan had not gone through.

Jason testified that after he and Angie began living on the Hickman property, he made numerous improvements. It was not until 2005 that appellants first attempted to obtain a loan to buy the property themselves. His broker advised him to apply to refinance the loan because a first purchase loan was too expensive. At that time, Jason and Lester were not on speaking terms, so Jason relayed the information about the loan to Angie so she could obtain her parents' permission to put them on the grant deed.

Jason believed that Angie had obtained permission from her parents to put their names on the grant deed and that the only thing he was required to do was to have Vermeulen notarize the deed. He refused to sign a quitclaim deed in favor of his former in-laws, the Henslees, because he felt that he had spent close to $60,000 on improvements on the property and that he should first be reimbursed.

DISCUSSION

I. The trial court did not abuse its discretion in allowing the prosecution to amend the information.

Both appellants contend that the trial court abused its discretion in allowing the prosecution to amend Count 1 by substituting the word "another," for the names "Lester and Kathy Henslee" as victims of the charged offense. They argue that they had no prior notice and that such change in designation of the victims at the close of trial was prejudicial. We disagree.

A. Procedural History

Count 1 of the information initially alleged:

> "The said JASON JOSEPH HUBER and ANGIE SUSAN HUBER on or about the 18th day of August, 2005, at and in the County of Stanislaus, State of California, and prior to filing of this Information, did willfully, unlawfully, fraudulently and feloniously make, alter, forge, counterfeit, utter, publish, pass, or attempt or offer to pass, a check, bill, money order, or other order in writing for the payment of money, to wit, Grant Deed, knowing that said checks, bills, or orders were false, altered, forged and counterfeited, with the intent then and there to cheat and defraud LESTER HENSLEE and KATHY HENSLEE."

At the close of evidence, the People made a motion pursuant to section 1009 to amend count 1 of the information that had originally charged both appellants with forgery of a grant deed with the intent "to cheat and defraud Lester and Kathy Henslee." The People were permitted to amend count 1 to delete Lester and Kathy Henslee as the victims and replace their names with the word "another." The People argued that the amendment was to conform to the proof produced by the defense that the appellants' forged the Henslees' names in order to obtain a refinancing loan and not to deprive the Henslees of any property interest. Appellants objected to the amendment on the ground it altered the nature of the defense and thus there was no opportunity to defend. In granting the People's request, the court noted that the names of Lester and Kathy Henslee had not been previously presented to the jury as the victims nor did the jury instructions specifically name the victims. Thus, the court found the amendment appropriate.

B. Analysis

The court may allow amendment of the accusatory pleading at any stage of the proceeding, up to and including the close of trial, so long as there would be no prejudice to the defendant. (§ 1009; *People v. Graff* (2009) 170 Cal.App.4th 346, 362.) However, an indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown at the preliminary examination. (*People v. Graff, supra*, at p. 362.) The trial court's decision in allowing amendment at trial will not be disturbed on appeal absent a clear abuse of discretion. (*People v. George* (1980) 109 Cal.App.3d 814, 819.)

Appellants argue that they were prejudiced by the amendment of count 1, the forgery count, because their defense was focused on whether they intended to defraud the Henslees, whereas the amendment allowed conviction if they intended to defraud anyone. As a result, they argue that the amendment caught them unaware and deprived them of the opportunity to prepare for and defend the new allegations. We disagree.

Appellants have not shown that the trial court abused its discretion. Count 1 charged appellants with forgery. The offense required the People to prove that appellants, with the intent to defraud, forged a grant deed knowing the same to be false. Thus, appellants would have committed forgery regardless of whether they intended to defraud the Henslees of a part of their property right or whether they intended to defraud a lender from which they would obtain financing. Evidence was introduced at trial by the defense that appellants forged the grant deed to obtain a refinancing loan. Thus, the amendment did no more than conform the allegations to proof admitted at trial: that appellants intended to defraud either the Henslees or the loan company, or both. Since both of these factual scenarios would have been sufficient to constitute forgery, the trial court did not err in granting the amendment.

II. Alleged Jury Instruction Errors

Appellants contend the trial court committed several prejudicial instructional errors requiring reversal. First, both appellants contend that their forgery convictions on Count 1 must be reversed because the trial court erroneously failed to instruct the jury on the definition of forgery as set forth in their requested instruction, CALCRIM No. 1900 (forgery by false signature (Pen. Code, § 470(a)). Second, appellant Angie Huber contends the trial court denied her due process right to present a defense by instructing the jury on CALCRIM No. 1862 (return of property not a defense to theft (Pen. Code, §§ 512, 513), that return of the grant deed was not a defense to forgery, and by refusing

to instruct with a modified version of CALCRIM No. 3406 (mistake of fact).[3] Lastly, appellant Jason Huber argues that the trial court prejudicially erred in refusing to instruct the jury with CALCRIM No. 335 (accomplice testimony: no dispute whether witness is accomplice).[4] We disagree as to all contentions and will affirm.

A. Standard of Review

Claims of errors in jury instructions, including contentions that the trial court had a duty to give an instruction sua sponte, involve questions of law that are reviewed de novo. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424 (*Russell*); *People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

B. Duty to Instruct

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) We evaluate whether an instruction is misleading by reviewing the jury charge as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) Instructions are not considered in isolation. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) "'"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."' [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) "An instruction can only be found to

---

[3] In appellant Jason Huber's opening brief, he requested permission to join in any applicable arguments of co-appellant Angie Huber pursuant to California Rules of Court, Rule 8.200(a)(5).

[4] In appellant Angie Huber's reply brief, she requested permission to join in any arguments of co-appellant Jason Huber pursuant to California Rules of Court, Rule 8.200(a)(5).

be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. [Citation.]" (*People v. Campos, supra,* 156 Cal.App.4th at p. 1237.)

In reviewing a claim of instructional error, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) Juries are presumed to follow the trial court's instructions, unless the record affirmatively indicates otherwise. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.). When considering a claim that the trial court improperly instructed the jury, a reviewing court must determine whether there is a reasonable likelihood the jury construed or applied the instructions in an objectionable fashion. (*People v. Osband* (1996) 13 Cal.4th 622, 685-686.) We review all instructions given, not just the instruction complained of, to determine whether the jury charge as a whole is correct. (*People v. Musselwhite, supra,* 17 Cal.4th at p. 1249.)

Under settled law, a trial court must instruct on any defense that is supported by substantial evidence when requested by the defense. (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.) "Evidence is substantial if a reasonable jury could find the existence of the particular facts underlying the instruction." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1426.) Expressed another way, evidence is substantial when, if believed, it would be sufficient to raise a reasonable doubt about the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) However, there is no obligation to instruct a jury with a defense if the evidence supporting the defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) Finally, any doubt as to the sufficiency of the evidence to support the instruction should be resolved in favor of the accused. (*Russell, supra,* 144 Cal.App.4th at p. 1430.)

C. Analysis

1. CALCRIM No. 1900

Appellants contend that the trial court committed reversible error with regard to count 1 instructing the jury in CALCRIM No. 1904 (forgery by falsifying, altering or counterfeiting document (Pen. Code, § 470(d)) rather than their proffered instruction, CALCRIM No. 1900 (Forgery by false signature (Pen. Code, § 470(a)).

Appellants specifically argue that the instructions given omitted the element of a knowing lack of authority to sign the document at issue, thus allowing them to be convicted without having the prosecution prove every element of forgery. Further, appellants contend that such error was prejudicial because the defense had presented evidence to the effect that both appellants believed that the Henslees consented to the signing of the document. We disagree.

a. The Charging Document

Appellants were charged in count 1 of the information with forgery committed by forging a document in violation of § 470, subdivision (d). The charge specifically alleged that they "did willfully, unlawfully, fraudulently and feloniously make, alter, forge, counterfeit, utter, publish, pass, or attempt or offer to pass a … grant deed, knowing that said [grant deed was] false, altered, forged and counterfeited, with intent then and there to cheat and defraud LESTER HENSLEY and KATHY HENSLEY." At the conclusion of the evidence, the superior court allowed the prosecution to amend the last line to state "cheat and defraud another," to conform to proof.

b. The Underlying Statute

Section 470 states in pertinent part:

> "(a) Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery.
>
> "(b) Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery. [¶] . . . [¶]

> "(d) Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits . . . publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged or counterfeited, is guilty of forgery: . . . to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or falsifies the acknowledgment of any notary public, or any notary public who issues an acknowledgment knowing it to be false; or any matter described in subdivision (b)."

"The purpose of the statute against forgery is to protect society against the fabrication, falsification and the uttering of instruments which might be acted upon as being genuine. The law should protect, in this respect, the members of the community who may be ignorant or gullible as well as those who are cautions and aware of the legal requirements of a genuine instrument." (*People v. Jones* (1962) 210 Cal.App.2d 805, 808-809.) Whether the forged instrument is one of a particular name or character, or if genuine, would create legal liability, is immaterial. The test is whether upon its face the instrument will have the effect of defrauding one who acts upon it as genuine. A deed--even one which conveys no title--may be the subject of forgery. (*People v. McKenna* (1938) 11 Cal.2d 327, 332-333.)

c. <u>The Instructions</u>

The trial court instructed the jury pursuant to CALCRIM No. 1904, defining a violation of section 470, subdivision (d), as follows:

> "The defendants are charged in Count I with forgery, committed by forging a document in violation of Penal Code section 470(d). To prove that a defendant is guilty of this crime, the People must prove that the defendant forged a grant deed knowing the same to be false;
>
> "And, two, when the defendant did that act, he or she intended to defraud.
>
> "Someone intends to defraud if he or she intends to deceive another person either to cause a loss of something of value or to cause damage to a legal, financial, or property right."

The trial court denied appellants' request that the jury also be instructed on CALCRIM No. 1900, an instruction which defines a violation of section 470, subdivision

(a). As proffered by appellant Angie Huber,[5] the jury would have been instructed as follows:

> "The defendant is charged in Count I with Forgery committed by signing a false signature in violation of Penal Code section 470(a).
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> "1. The defendant signed Lester Hensley [*sic*] and Kathy Hensley's [*sic*] names to a Grant Deed;
>
> "2. The defendant did not have authority to sign those names;
>
> "3. The defendant knew that she did not have that authority; AND
>
> "4. When the defendant signed the document, she intended to defraud.
>
> "Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss, or to cause damage to, a legal, financial, or property right.
>
> "It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.
>
> "The People allege that the defendant forged the following documents: Grant Deed.
>
> "You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged the document."[6]

---

[5]Penal Code § 470, subdivision (a) provides: "Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery."

[6] A notation on the copy of CALCRIM No. 1900 in the clerk's transcript suggests that appellant Jason Huber proffered the instruction. However, a review of the reporter's transcript reveals that appellant Angie Huber was the party who sought the instruction.

d. The Instructional Conference

On September 24, 2008, the trial court and counsel held a reported conference on proposed jury instructions. The prosecutor proffered CALCRIM No. 1904, said it referred to forgery by falsifying, altering or counterfeiting a document, and noting that the instruction was based upon section 470, subdivision (d). The court noted that the prosecution could have charged appellants under either section 470, subdivision (a) or subdivision (d) and that CALCRIM No. 1904 was "the instruction for 470(d)." Defense counsel disagreed, arguing that forgery is "but one crime" and the subdivisions of section 470 do not create separate crimes. Counsel maintained "all the legislature intended to do here [in adopting section 470] was to break it out into sections for comprehension for understandability." Counsel asserted the instant case amounted to "the classic allegation of forgery" and that CALCRIM No. 1900 was the appropriate instruction. Defense counsel further argued that CALCRIM No. 1904 was inadequate because it did not address two elements critical to the defense--the authority of the appellants to sign the Henslees' names and the belief of the appellants as to the existence of such authority. !(RT 386-387)! In response, the prosecutor argued "that CALCRIM 1904 is still the instruction medium for a 470(d)."

The court and counsel then engaged in the following dialogue:

> "MR. HUTCHESON [Counsel for Appellant Susan Huber]: . . . I think it's an absolutely dead-bang winner type issue in that you can't have special instructions for subsections [of section 470] that are all one crime. It's two-fold.
>
> "THE COURT: There's different ways to commit the crime.
>
> "MS. FERREIRA [deputy district attorney]: My point though on what he's saying about that is there are different subsections of the crime of forgery that covers different conduct. The forgery itself may just be one crime, falsely signing someone else's name, counterfeiting, altering, whatever it is, but the point is according to what subsection that you charge, is according to what you have to prove. And the proof is for subsection D the defendant falsely made or forged a grant deed, and when the defendant

did that, she or he had the intent to defraud. At the time that it's forged, there's an intent to defraud.

"MR. HUTCHESON: And, Your Honor, the forgery is the signature.… This is a signature case, not a counterfeiting, not an altering, nothing else. [¶] So now, not to say that I do accept the argument, but even if you do, it still says 1900 is the appropriate instruction. It allows for all four elements to be proved. [¶] … [¶]

"THE COURT: … I think 1904 is appropriate. I'm going to refuse your instruction. I will note your objection to not giving 1900. I believe 1904 is the appropriate instruction because that is 470(d). There is also in terms of the defendant did what she did or he did with the intent to defraud. That will give you a chance to argue the mistaken belief issue."

e. Appellants' Contention

In sum, the prosecution maintained section 470, subdivision (d)--as charged in the information--set forth a crime that was substantively different from that set forth in section 470, subdivision (a) and that CALCRIM No 1904 was the appropriate instruction to explain a charge under subdivision (d). In contrast, appellant Angie Huber's counsel maintained at trial there was "but one crime [of] forgery" and on appeal that CALCRIM No. 1904 "relieved the prosecution of its burden to prove that appellant did not have authority to sign her parent's names and knew that she did not have their permission to sign their names." Defense counsel maintained that CALCRIM No. 1900 was the appropriate instruction to address the latter two elements.

f. Discussion

Generally, the crime of forgery, as defined by the different subdivisions of section 470, consists of either of two distinct acts: the fraudulent making of an instrument, or its uttering by passing on such instrument as genuine, with knowledge of its falsity. The offense does not require the commission of both acts, but rather, it is complete when one either falsely makes a document without authority or passes such document with intent to defraud. (*People v. Luizzi* (1960) 187 Cal.App.2d 639, 644.)

Appellants rely on this court's opinion in *People v. Ryan* (2006) 138 Cal.App.4th 360 (*Ryan*) to assert reversible error based on the trial court's failure to give CALCRIM No. 1900. In *Ryan*, defendant and a companion entered three Jamestown, Tuolumne County, antique stores and stole purses and other items belonging to store personnel. Defendant used or attempted to use some of the checks, debit and credit cards, and identification cards taken from the purses. Law enforcement found goods purchased with these items, together with other purloined belongings, in a vehicle associated with defendant and her companion. In her defense, defendant admitted entering the stores but claimed her companion committed the thefts. Defendant was convicted of two counts of forgery by signing another's name (§ 470, subd. (a)) and two counts of forgery by making or passing a forged check (§ 470, subd. (d)), among many other offenses. She appealed, claiming she could not be properly convicted of the two counts alleged under subdivision (a) because subdivision (a) is a lesser included offense of forgery in violation of subdivision (d). This court did not adopt defendant's reasoning but did vacate the convictions and sentences on the counts alleged under section 470, subdivision (a).

In reaching this result, we initially noted that the various subdivisions of section 470 do not set out greater and lesser included offenses, but different ways of committing a single offense, i.e., forgery. We examined the history of section 470, stating: "The [1998] overhaul of section 470 and related provisions was intended to '"make [the] laws governing financial crimes more 'user friendly'"' and '"to clarify and streamline existing law with regard to forgery and credit card fraud."' It was not intended to 'change the meaning or legal significances of the law,' but '"merely [to] organize[] the relevant code sections into a cohesive and succinct set of laws that can be readily referred to and understood."' (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2008 (1997-1998 Reg. Sess.) as introduced Feb. 18, 1998, p. 2.)" (*Ryan, supra,* 138 Cal.App.4th at p. 366.)

In *Ryan*, the defendant signed another person's name to two checks and then used those checks to make purchases at two different stores. As to each store, the defendant was convicted of one count of forgery by signing another's name under section 470, subdivision (a) and one count of passing a forged check, under section 470, subdivision (d). We reversed the judgment of conviction on the counts alleged under subdivision (a), holding that the various subdivisions of sections 470 described different ways of committing the same crime, and that a defendant could not suffer multiple convictions for forgery based on a single instrument. We quoted *People v. Frank* (1865) 28 Cal. 507, 513, as follows:

> ". . . Now, each of those acts singly, or all together, if committed with reference to the same instrument, constitute but one offense. Whoever is guilty of either one of these acts is guilty of forgery; but if he is guilty of all of them, in reference to the same instrument, he is not therefore guilty of as many forgeries as there are acts, but of one forgery only." (*Ryan, supra*, 138 Cal.App.4th at pp. 366-367.)

Pursuant to section 954, an accusatory pleading may charge two or more different offenses connected together in their commission or different statements of the same offense. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading and the defendant may be convicted of any number of the offenses charged. (§ 954; *People v. Soper* (2009) 45 Cal.4th 759, 771.) However, in *Ryan* we held the commission of any one or more of the acts enumerated in section 470, in reference to the same instrument, constitutes but one offense of forgery. Thus, under section 954 appellant could be charged with multiple counts of forgery with respect to the incidents at the two different stores but could be convicted of only one such count with respect to each incident. Accordingly, we vacated two of the four convictions defendant suffered in connection with the incidents. We stated: "Since her conduct in each incident appears to be more completely covered by subdivision (d) of section 470, we will vacate her convictions on counts V and VI, which involved subdivision (a) of the statute." (*Ryan, supra,* 138 Cal.App.4th at pp. 371-372.)

Citing *Ryan*, appellants contend there is only one crime of forgery, the subdivisions of section 470 contain different elements of that single offense, and that each of those elements must be proven in order to convict them. Appellants specifically refer to the "elements of authority to sign or belief in the authority to sign the deed" and notes their absence from CALCRIM No. 1904. However, *Ryan* actually stands for the proposition that there is only one crime of forgery, and though both subdivisions of section 470 delineate a species of that crime, each is a separate theory with separate elements. (*Ryan, supra*, 138 Cal.App.4th at pp. 366-367.) The Third Appellate District has recently observed: "The rule of one count of forgery per instrument is in accord with the essence of forgery, which is making or passing a false document."[7] (*People v. Kenefick* (2009) 170 Cal.App.4th 114, 123).

In the instant case, appellants were each convicted of forgery under section 470, subdivision (d), which prohibits knowingly forging or uttering a certificate of ownership (grant deed) with the intent to defraud. Although the prosecution could have charged appellants with a violation of section 470, subdivision (a), the prosecution chose to proceed under section 470, subdivision (d), and thus it was proper for the trial court to instruct the jury under CALCRIM No. 1904. In California, jury instructions approved by the Judicial Council are the official instructions for use in state courts and use of such instructions is strongly encouraged. (Cal. Rules of Court, rule 2.1050(e); *People v. Thomas* (2007) 150 Cal.App.4th 461, 465-466.)

Among other elements, a conviction of forgery requires the person to have the specific intent to defraud another person.[8] An intent to defraud is an intent to deceive

---

[7] Conversely, the false making and forging of separate instruments, although done at the same time, are separate and distinct offenses. (*People v. Cline* (1947) 79 Cal.App.2d 11, 19, citing *People v. Gayle* (1927) 202 Cal. 159, 162-163.)

[8] Penal Code section 8 states: "Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever."

another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth, or by any artifice or act designed to deceive. (*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.) Proof of intention to defraud may consist of reasonable inferences drawn from affirmatively established facts. (*People v. Leach* (1959) 168 Cal.App.2d 463, 467.)[9]

CALCRIM No. 1904 specifically advised the jury that the People bore the burden of proving that each appellant forged a grant deed, knowing the same to be false, and intended to defraud when he or she did that act. Appellants nevertheless contend "[i]t was critical for the jury to receive an instruction on the offense elements of authority to sign or belief in the authority to sign the deed." Although section 470, subdivision (a) and CALCRIM No. 1900 expressly refer to such authority, section 470, subdivision (d) and CALCRIM No. 1904 do not. CALCRIM No. 1904, as read to the jury, did not preclude defense counsel from arguing that Angie Huber had a mistaken belief as to her authority to sign the deed and, therefore, did not have the requisite specific intent to defraud. In fact, the trial court specifically advised counsel during the reported conference on jury instructions: "I believe 1904 is the appropriate instruction because that

---

9 We note in passing that the grant deed that appellants presented to Notary Public Dirk B. Vermeulen bore signature lines for Lester Henslee, Kathy Henslee, Jason Huber, and Angie Huber. Signature lines for the appellant grantees were superfluous under California law because Civil Code section 1901 states: "An estate in real property . . . can be transferred only . . . by an instrument in writing, *subscribed by the party disposing of the same*, or by his agent thereunto authorized in writing." (Emphasis added.) From the presence of signature lines for the grantees, a reasonable trier of fact could infer that appellants were unaware of the formal requisites of conveyancing and that some sort of mistaken belief existed. Alternatively, a reasonable trier of fact could infer that appellant grantees placed their signature lines on the grant deed in an effort to persuade an unsuspecting notary to affix his seal on the deed prior to appellants forging the signatures of the purported grantors of the real estate.

is the [instruction based upon] 470(d). There is also [set forth in that instruction] in terms of the defendant did what she did or he did with the intent to defraud. That will give you a chance to argue the mistaken belief issue."

The instruction given, CALCRIM No. 1904, required proof that "the defendant forged a grant deed knowing the same to be false." This, we note, allowed defense counsel to argue that "in order to know the document is forged, you have to know you don't have permission." We find that no error resulted in refusing appellant's requested instruction.

2. CALCRIM No. 1862

Appellant Angie Huber contends the trial court denied her right to present a defense by instructing the jury on CALCRIM No. 1862, that return of the grant deed is not a defense to forgery. She argues that the instruction permitted the jury to disregard evidence of the quitclaim deed she signed and also precluded the jury from considering evidence that she lacked intent to defraud at the time she signed the grant deed. We disagree.

With regard to count 1, forgery, the trial court instructed the jury in accordance with CALCRIM No. 1862, as follows:

> "If you conclude that the People have proved that the defendant committed Forgery of a Grant Deed in violation of Penal Code Section 470(d), the return or offer to return the Grant Deed, therefore the property wrongfully obtained[,] is not a defense to that charge."

The instruction given applied only if the jury had already found that appellant committed a forgery. However, appellant contends the instruction prevented her from presenting evidence of a lack of intent to defraud. She argues that her case is analogous to *People v. Edwards* and *People v. Marsh*, in which it was held that where there is evidence that, at the time of the taking, the defendant had no fraudulent intent, the defendant is entitled to present such evidence. (*People v. Edwards* (1992) 8 Cal.App.4th 1092; *People v. Marsh* (1962) 58 Cal.2d 732.) We disagree.

In *People v. Edwards*, the defendant sought to present evidence that, after obtaining title to the victim's property, he re-conveyed that property back to him. Defendant argued the evidence showed that his intent at the time of the taking was not larcenous. (*People v. Edwards, supra,* 8 Cal.App.4th at pp. 1092, 1099.) The trial court denied his request and cited sections 512 and 513, which provide that the restoration of property is not a defense to an embezzlement charge. On appeal, the court held that the trial court erred in denying the request and found that sections 512 and 513 were incorrectly applied to defendant's case. (*Id*. at p. 1101.) The court stated: "Penal Code sections 512 and 513 are aimed at the repentant thief who seeks to return that which he knows he illegally took; these sections are not applicable when a defendant presents a defense and evidence to demonstrate that his handling of the property was consistent with a nonlarcenous intent at the time of the taking." (*Id.* at p. 1100.) The court also noted that although restoration of property is no defense to a charge of theft, a defendant has a fundamental right to present a defense and all pertinent evidence of significant value to that defense. (*Id.* at 1099.)

In *People v. Marsh*, the trial court excluded evidence presented by defendants to negate the specific intent element of grand theft. The Supreme Court reversed, finding the trial court erred in excluding the evidence because it precluded the jury from considering evidence that would have supported the defendants' defense that they acted in good faith. (*People v. Marsh, supra,* 58 Cal.2d at pp. 732, 741.)

These cases are distinguishable. In the instant case, appellant testified that she was acting on the advice of her loan broker that in order to get a loan she and co-appellant would have to be placed on the deed. She also testified she believed she had permission to sign her parents' names to the grant deed. When appellants were unable to secure a loan, appellant believed that the deed had been voided. When her father notified her that the deed was still valid, she immediately signed over a quitclaim deed. Unlike *Edwards* and *Marsh*, appellant was not precluded from presenting evidence or arguing

that she had no intent to defraud at the time she signed the grant deed. Rather, she presented such evidence, and the jury was instructed that a lack of intent to defraud at the time the act was committed constituted a failure of proof on that required element.

The instruction given did not preclude the jury from considering evidence of appellants' lack of intent to defraud. Appellant was able to present a defense to the crime charged and submit evidence to negate the intent element of that crime. The instruction properly advised the jury that if they found appellant guilty of forgery, she would not be entitled to an acquittal on the basis that she voluntarily quitclaimed her interest back months later.

Appellants' challenge to CALCRIM No. 1862 is rejected.

3. CALCRIM No. 3406

Appellant Angie Huber contends the trial court prejudicially erred in refusing to instruct on CALCRIM No. 3406, where the defense presented evidence that warranted such instruction. Appellant argues that absent the instruction, the jury was unable to properly evaluate the evidence that she lacked intent to defraud. Further, she contends the trial court's failure to instruct on mistake of fact violated her right to present a complete defense. She further argues the error must be assessed under the federal standard of prejudice, which asks whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) She maintains that the instructional error was prejudicial under this standard and thus conviction for both counts should be reversed. We disagree.

Appellants were charged in count 1 with forgery of a document in violation of section 470, subdivision (d). To sustain a conviction under section 470, subdivision(d), the prosecution was required to prove that the defendant forged a grant deed, knowing the same to be false, and, when defendant did that act, he or she intended to defraud. (CALCRIM No. 1904.) Intent to defraud was defined as the intent to deceive another person "either to cause a loss of something of value, or to cause damage to, a legal,

financial, or property right." (*Ibid.*) In addition, the jury was informed pursuant to CALCRIM No. 252 that in order to find defendant guilty of the charged crime it must find that defendant not only intentionally committed the prohibited act, but he or she did so with the specific intent described in the instruction for that crime.

A modified version of CALCRIM No. 3406, as requested by appellant, would have instructed the jury as follows:

> "The defendant is not guilty of Forgery or Recording of a False Instrument if she did not have the intent or mental state required to commit the crime because she reasonably did not know a fact or reasonably and mistakenly believed a fact.
>
> "If the defendant's conduct would have been lawful under the facts as she reasonably believed them to be, she did not commit Forgery or Recording of a False Instrument.
>
> "If you find that the defendant believed that she had authority or permission to sign the grant deed, she did not have the specific intent or mental state required for Forgery or Recording of a False Instrument.
>
> "If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for Forgery or Recording a False Instrument, you must find her not guilty of those crimes."

Appellant's defense was, essentially, that she lacked the specific intent to defraud because she had an honest and reasonable belief that her father gave her permission to sign his and her mother's names to the deed and that she was operating under the assumption that being on the deed would allow her and co-appellant to get a loan. Thus, appellant contends, such evidence was sufficient to warrant a mistake of fact instruction. We disagree.

An honest and reasonable belief in the existence of circumstances, which, if true, would make that act with which the person was charged innocent, constitutes a defense to that charge. (*People v. Reed* (1996) 53 Cal.App.4th 389, 397, citing § 26.) In the case of a specific intent crime, such as forgery, the law does not require that the erroneous belief be reasonable, although the fact that it is unreasonable may cause the jury to disbelieve

the defendant's claim that he held it. (*People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10.) A good faith mistake of fact, even if it is unreasonable under the circumstances, will vitiate specific intent. (§ 26 subd. (3); *People v. Scott* (1983) 146 Cal.App.3d 823, 831.) To determine whether a mistake of fact applies, we must assume the facts were as the defendant perceived them. (*People v. Scott*, *supra*, at p. 831.)

At trial, Lester Henslee testified that on the day the grant deed was signed and recorded, he was on a houseboat in the Don Pedro Reservoir when he received a cell phone call from appellant, Angie Huber. The reception was poor and Lester did not hear most of what appellant said. He remembered her saying something about getting a loan and he told her to "go for it." However, he testified that appellants would often notify him when they were attempting to get a loan, and assure him that if the loan did not go through, they would move off the property. He did not believe that the purpose of appellant's call was to ask for his consent to do anything. He testified that he never gave Angie permission to sign his or his wife's name to the deed and transfer an interest in the property to appellants.

Appellant testified that when her father said, "Go for it," she believed that meant she had his permission to sign her mother's name to the grant deed, and that the only reason she signed her mother's name was to secure a refinancing loan. She knew that she and Jason would be unable to refinance the loan if their names were not on the title to the property. Further, appellant testified that she never owned any interest in the property and that the reason she took the grant deed to the recorder's office was to secure a loan.

We cannot say that there was substantial evidence to support a mistake of fact defense. (*Russell*, *supra*, 144 Cal.App.4th at p. 1427.) The evidence on which appellant relies--that she thought she had permission to sign her parents' names to the grant deed--at most would have addressed the allegation that she intended to defraud her parents. However, it said nothing about whether she intended to defraud anyone else, including a loan company. Regardless of whether appellant thought she had her parents' consent, the

jury could have found that she signed a grant deed, knowing that she had no real interest in the property, in order to deceive a lender into giving her and co-appellant a loan. Thus, appellant's mistaken belief about whether she had permission to sign and record the grant deed did not disprove the existence of intent to defraud. Thus, the alleged factual mistake did not create a sua sponte instructional obligation concerning mistake of fact.

Finally, as to count 2, recording a false instrument is a general intent offense, requiring only that a defendant knowingly commits the proscribed act. The jury was instructed that in order to find the defendants guilty of violating section 115, the People must prove: (1) the defendant offered a forged document for recording in a public office in California; (2) when the defendant did that act, he or she knew that the document was forged; and (3) the document was one that if genuine could be legally recorded. (CALCRIM No. 1945.) Further, the jury was informed pursuant to CALCRIM No. 252, as follows:

"The following crime requires general criminal intent.

> "Penal Code Section 115 as charged in Count II. For you to find the person guilty of this crime, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose, however, it is not required that he or she intend to break the law. The act [required is explained in] the instructions for that crime."

Whether appellant believed she had her parents' permission to sign the deed was irrelevant to the issue of intent under count 2. She satisfied the elements of this general intent crime when she knowingly filed the forged grant deed. Thus, the requested instruction (CALCRIM No. 3406) was not required as to this offense.

Even assuming, arguendo, that the trial court should have instructed the jury with CALCRIM No. 3406, we conclude that the instructional error was harmless.

Appellant asserts the failure to instruct on the mistake of fact defense amounts to constitutional error and must be assessed under the federal *Chapman* "harmless beyond a reasonable doubt" standard. (*Chapman, supra*, 386 U.S. 18.) However, the Supreme

Court has left unsettled the question of whether a failure to instruct sua sponte on a defense in a criminal case violates any provision of the United States Constitution (e.g., right to present a defense, right to a jury trial, right to due process, etc.), which would require application of the *Chapman* test for prejudice (i.e., reversal required unless error was harmless beyond a reasonable doubt) instead of the *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) test for prejudice (i.e., reversal not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred). In fact, the California Supreme Court noted it had yet to decide which standard of prejudice should be applied when a trial court errs by not instructing sua sponte on a defense. (*People v. Salas, supra*, 37 Cal.4th at p. 984 ["We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense. [Citation.]"].) Nevertheless, in *Russell*, the appellate court stated: "Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in [*Watson*]." (*Russell, supra,* 144 Cal.App.4th at p. 1431.) Further, in cases involving other types of defenses, courts have applied the *Watson* standard. (See e.g., *People v. Randle* (2005) 35 Cal.4th 987, 1003, disapproved on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201 [imperfect defense of others]; *People v. Blakeley* (2000) 23 Cal.4th 82, 93 [unreasonable self defense].)

Here, we need not decide whether the *Chapman* or *Watson* standard for prejudicial error applies to the failure of a trial court to instruct sua sponte on a mistake of fact defense because the error here was harmless under either standard. (*People v. Wright* (2006) 40 Cal.4th 81, 98 [failure to instruct on defense was harmless beyond a reasonable doubt where the factual question posed by the omitted instruction was resolved adversely to the defendant under other, properly given instructions.].) In the instant case, the jury necessarily rejected the factual predicate of the omitted mistake of fact defense--that appellant did not have an intent to defraud because she held a good faith belief that she had permission from her parents to sign the grant deed. Instead, under other properly

given instructions, it found that she intended to defraud when she forged her mother's name on the grant deed. By finding her guilty, the jury concluded that she intended to defraud someone, the only intent necessary for a conviction.

Since the jury resolved the issue of mistake of fact against appellant under other properly given instructions, any error in failing to give the instruction was harmless.

4. CALCRIM No. 335

Appellant Jason Huber contends the trial court prejudicially erred by giving CALCRIM No. 334 rather than CALCRIM No. 335 with respect to the testimony of Dirk Vermeulen. We disagree.

CALCRIM No. 334 [accomplice testimony must be corroborated; dispute whether witness is accomplice] as given to the jury stated:

> "Before you may consider the statement or testimony of Dirk Vermuelin [*sic*] as evidence against the defendants, you must decide whether Dirk Vermuelin [*sic*] was an accomplice.
>
> "A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if, one, he or she knew of the criminal purposes of the person who committed the crime; and, two, he or she intended to and did, in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime.
>
> "The burden is [on] the defendant to prove that it is more likely than not that Dirk Vermuelin [*sic*] was an accomplice. If you decide the declarant or witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness.
>
> "If you decide that a declarant or witness was an accomplice, then you may not convict a defendant of Penal Code Section 470 or Penal Code Section 115 based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict only if;
>
> "One, the accomplice's statement or testimony is supported by other evidence that you believe.

"Two, the supporting evidence is independent of the accomplice's statement or testimony.

"And, three, that supporting evidence tends to connect the defendant to the commission of the crimes.

"Supporting evidence however may be slight. It does not need to be enough by itself to prove the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statements or about which the accomplice testified.

"On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission.

"The supporting evidence must tend to connect the defendant to the commission of the crime. Evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not however arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining with care and caution -- examining it with care and caution and in light of all the other evidence."

CALCRIM No. 335 [accomplice testimony; no dispute whether witness is accomplice], as requested by appellant Jason Huber, stated:

"If the crimes of Penal Code Section 470 or Penal Code Section 115 were committed, then Dirk Vermeulen was an accomplice to those crimes.

"You may not convict a defendant of Penal Code Section 470 or Penal Code Section 115 based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if:

"1. The accomplice's testimony is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's testimony;

"AND

"3. That supporting evidence tends to connect the defendant to the commission of the crimes.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice.

"Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

At trial, the prosecution presented evidence that on August 18, 2005, Dirk Vermeulen, an insurance agent and licensed notary public, received a phone call from appellant Jason Huber indicating they need a notary's services. Mr. Vermeulen testified that appellant's were clients of his and had previously used his notary services. When appellants came into his office, they presented him with an unsigned grant deed that contained four signature lines with the typed names of appellants and Kathy and Lester Henslee. Vermeulen was told that the document needed to be notarized because appellants were purchasing the Henslees' property.

Vermeulen witnessed appellants' signatures and was under the impression that he and appellants were then going to go where the Henslees were to witness their signatures. He then notarized the documents as though he had witnessed all four signatures. Appellants then changed their plans and left without taking Vermeulen to the Henslees' location. Vermeulen was charged along with appellants with forgery and recording a false instrument. As part of a plea bargain, Vermeulen pled guilty to one count of unlawful notarial acts.

The law has long recognized that the testimony of accomplices is subject to the taint of improper motive. Consequently, a conviction cannot stand on the uncorroborated testimony of an accomplice, and a jury must be instructed to view with caution the testimony of an accomplice presented by the prosecution. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1157.) When there is sufficient evidence that a witness is an accomplice, the court has a sua sponte duty to instruct the jury on the principles of law governing accomplices, including the need for corroboration. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) For purposes of determining whether accomplice witness instructions are necessary, an accomplice is defined as "'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'" (§ 1111; *People v. Verlinde, supra,* 100 Cal.App.4th at p. 1158.)

In order to be charged with the identical offense, the witness must be a principal in the crime. (§ 31; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1217.) Penal Code section 31 defines principals to include, "[a]ll persons concerned in the commission of a crime … whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission …." A person aids or abets if he or she acts with knowledge of the criminal purpose of the perpetrator and with an intent or purpose of either committing, or of encouraging or facilitating commission of, the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

A witness's status as an accomplice "'is a question for the jury if there is a genuine evidentiary dispute [on knowledge and intent] and if "the jury could reasonably [find] from the evidence" that the witness is an accomplice.'" (*People v. Verlinde*, *supra*, 100 Cal.4th at p. 1158.) To be an accomplice as a matter of law, there can be no dispute that the witness was an accomplice, either with respect to the facts or the inferences to be drawn therefrom. The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

Appellant Jason Huber argues that Vermeulen was an accomplice as a matter of law because he faced prosecution for notarizing a grant deed and the offenses charged in counts 1 and 2 could not have been committed without the assistance of Vermeulen. We disagree.

As to the forgery charge, the record does not compel a finding that Vermeulen shared liability as an accomplice. First, although Vermeulen was originally charged with the same offenses as appellants, there was no evidence that he acted with the same intent and knowledge as appellants. Rather, as his plea bargain indicated, Vermeulen was convicted only of unlawfully notarizing a grant deed. His plea indicates only that he failed to properly follow procedures in notarizing a grant deed. He was not convicted of either forgery or recording a false instrument. Thus, it cannot be said there is no dispute as to whether Vermeulen was an accomplice who acted with knowledge of the criminal purpose and intent to facilitate the offense. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 834.) Appellant failed to sustain his burden of establishing Vermeulen's liability as an accomplice as a matter of law, and the trial court properly instructed the jury to decide that question.

Assuming the trial court should have found Vermeulen was an accomplice as a matter of law and instructed accordingly, appellant suffered no prejudice. Failure to instruct on accomplice liability is harmless if there is sufficient corroborating evidence in the record. (*People v. Lewis* (2001) 26 Cal.4th 334, 370.) Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. The evidence is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 834.)

There was more than sufficient corroborating evidence to support Vermeulen's testimony. First, the grant deed itself contained the signature of appellants, the notarized signature and stamp of Vermeulen, and the forged signatures of the Henslees. Further,

neither appellant contradicted Vermeulen's testimony in any significant way. Rather, both appellants admitted to signing their names on deed in his presence, but acknowledged that the signatures of the Henslees were placed there at some other time.

It is clear from the record that sufficient corroborating evidence was present. Thus, any error was harmless.

III. Appellants are not entitled to relief as a result of cumulative error

Appellant Angie Huber contends that she was denied due process as a result of cumulative error, and appellant Jason Huber joins in her argument. Appellants argue that the combination of the claimed errors they asserted were sufficient to deny them due process. We disagree.

A determination by the reviewing court that there was no cognizable error, as is the case here, requires no further discussion. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1232). There was no cumulative error.

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Levy, Acting P.J.

_____
Dawson, J.